

Yuo-Fong C. Amato (CA SBN 261453)  
Email: bamato@gordonrees.com  
GORDON & REES, LLP  
101 W. Broadway, Suite 2000  
San Diego, California 92101  
Phone: (619) 696-6700  
Fax: (619) 696-7124

Attorneys for Plaintiff  
CrossFit, Inc.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CROSSFIT, INC., a Delaware corporation,

Plaintiff,

v.

360 FITNESS SUPERSTORE, a business entity  
of unknown origin; ALEX KRICHEVSKY,  
individually,

Defendants.

Case Number: 4:14-CV-00901-JSW

**DECLARATION OF MARSHALL  
BRENNER IN SUPPORT OF MOTION  
FOR PRELIMINARY INJUNCTION**

And related counterclaims.

I, Marshall S. Brenner, declare as follows:

1. I am Deputy General Counsel for CrossFit, Inc., the Plaintiff in this action. I have personal knowledge of the facts set forth herein, and am authorized to make this declaration on CrossFit's behalf. If called upon as a witness, I could and would testify competently under oath as to all such matters. As to matters stated on information and belief, I believe them to be true.

2. I am readily familiar with CrossFit's business operations, including its fitness methodology, competitions, marketing efforts, licensing, and trademark protection efforts. I am

Gordon & Rees LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

also familiar with the specific factual information involved in this matter and the events that led up to this instant lawsuit.

3. Attached as Exhibit A are true and correct copies of some of CrossFit's federal trademark registrations, including U.S. Reg. no. 3,007,458; Reg. no. 3,826,111; Reg. no. 4,049,689; Reg. no. 4,053,443; and Reg. no. 4,122,681.

4. Attached as Exhibit B are true and correct copies of the United States Trademark and Patent Office's Notices of Allowances for some of CrossFit's trademark applications, including Serial no. 85/936,449; Serial no. 85/629,318; Serial no. 85/792,895; and Serial no. 85/792,892.

5. CrossFit defines its CROSSFIT® brand fitness training program as "constantly varied functional movements performed at a relatively high intensity." This is so that the CROSSFIT® program will prepare trainees for any physical contingency.

6. CrossFit has developed and consistently utilized specific terminology for certain unique movements found within the CROSSFIT® brand of programming, including "thrusters," "wall ball," "hand release push-ups" (with the unique feature of raising your hands at the bottom position of the pushup), and "toes to bar." Additionally, CrossFit has developed and consistently utilized specific terminology describing the repetition scheme in a workout. For example, "21-15-9," means that the trainee must complete 21 repetitions of the designated movements, then 15 repetitions, and conclude with 9 repetitions. While some CROSSFIT®-branded workouts test pure strength, most are completed "for time." "For time" is a term of art in the CROSSFIT® community facilitating intensity. *Id.* "For time" means the workout should be completed as quickly as possible while maintaining proper mechanics.

7. As an example, the workout "Diane" is a "21-15-9" workout completed "for time." "Diane" consists of 21 repetitions of a 225-pound deadlift followed by 21 handstand pushups, then 15 repetitions of deadlifts and handstands pushups, and concludes with 9 repetitions of deadlifts and handstands pushups. Trainees can "scale" these workouts to adjust to their personal fitness level. For example, they can lower the weights for the deadlift and/or use an incline pushup, a regular pushup, a ring pushup, or a decline push up instead of a handstand

Gordon & Rees LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

pushup. The “Diane” workout was employed as the first event at the 2012 Regional Qualifier competitions, where athletes from around the world competed to qualify for the CROSSFIT® Games.

8. Each day, CrossFit posts a CROSSFIT® Workout of the Day (“WOD”) on its website. Most, if not all, licensed CROSSFIT® affiliates also post their own WODs for its own local community. The term WOD is used to refer to these CROSSFIT®-branded workouts. Though the term WOD is refers to CROSSFIT®-branded workouts, CrossFit opted not to protect the term “WOD” as a trademark, deciding instead to allow the public use the term as it wished. Others have also referred to CROSSFIT®-branded workouts as “high intensity interval training” (“HIIT”).

9. The community around the CROSSFIT®-branded workouts is one of the key component of why the workouts are effective: the camaraderie, as well as the competition, encourages and motivates the trainees. Enthusiastic and positive word-of-mouth from the adherents of the CROSSFIT®-branded workouts has resulted in an exponential growth of the CROSSFIT® brand. The CROSSFIT® workout is extremely accessible to all who wish to practice it; not only are CROSSFIT® gyms widely available, building a home gym is also extremely affordable. While of course trainees can buy as much equipment as they wish to, trainees can conduct CROSSFIT® exercises at home using only owning weights and a pull-up bar—everything else can be improvised.

10. While the CROSSFIT® methodology has been around since the 1980s, it became extremely popular around the mid-to-late 2000’s. CrossFit has hosted the annual CROSSFIT® Games since 2007. In 2007, the Games attracted 123 competitors. By 2011, a mere four years later, the CROSSFIT® Games welcomed over 26,000 competitors. That number continues to grow: In 2012, the CROSSFIT® Games welcomed 69,000 competitors; in 2013, 138,000 competitors; in 2014, close to 210,000 competitors. Tickets to attend the finals quickly sell out. Starting in 2011, the CROSSFIT® Games debuted on ESPN2; by 2013, the CROSSFIT® Games aired directly on the main network, ESPN; ESPN also streams the Games live on its universally accessible online broadcast. A recent replay of the 2011 CROSSFIT® Games enjoyed

Gordon & Rees LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

1 approximately 800,000 viewers. A Reebok and CrossFit commercial also aired during the 2012  
2 Super Bowl. Attached as Exhibit C are true and correct webpage screenshots regarding the  
3 CROSSFIT® Games.

4 11. Since 2002, CrossFit has published a multimedia magazine named “The CrossFit  
5 Journal” that currently has over 3,400 publications and/or articles. The CrossFit Journal is  
6 publicly accessible all over the world at <http://journal.crossfit.com>. In the last year, The CrossFit  
7 Journal has received over 4 million hits in the U.S., and 6 million hits worldwide. Attached as  
8 Exhibit D is a true and correct webpage printout of the main CrossFit Journal page.

9 12. The CrossFit website is the primary resource for its trainees, and the website  
10 receives at least 35 million hits per year, from 2011 to the present. In the last year, CrossFit  
11 received nearly 28 million hits in the U.S., and 41 million hits worldwide. CrossFit’s popularity  
12 is also reflected on its social media sites. As of April 2014, CrossFit’s Facebook page received  
13 close to 1.4 million “likes,” and the CROSSFIT® Games Facebook page received approximately  
14 500,000 “likes.” CrossFit has garnered close to 450,000 subscribers to its YouTube.com  
15 account. Close to 200,000 users follow CrossFit on Twitter, and close to 180,000 users follow  
16 the CROSSFIT® Games on Twitter. CrossFit also has close to 400,000 followers on Instagram.  
17 Attached as Exhibit E are true and correct copies of CrossFit’s Google Analytics information, as  
18 well as an internal report regarding CrossFit’s online social media statistics.

19 13. CrossFit encourages individuals that understand and agree with the CROSSFIT®-  
20 branded method and philosophy to become CROSSFIT® personal fitness trainers. Individuals  
21 that have completed CrossFit’s nationally standardized accreditation program receive a  
22 CROSSFIT® Level 1 trainer certificate, and are authorized to list their CROSSFIT®  
23 qualifications, and licensed to use the CROSSFIT® brand name on their business cards and  
24 resumes. CrossFit also offers training accreditation for specialized fields, including without  
25 limitation, CROSSFIT® defense, CROSSFIT® endurance running, CROSSFIT® football,  
26 CROSSFIT® gymnastics, CROSSFIT® kettlebells, CROSSFIT® kids, CROSSFIT® mobility,  
27 CROSSFIT® powerlifting, CROSSFIT® rowing, CROSSFIT® striking, CROSSFIT®  
28 strongman, CROSSFIT® weightlifting.

Gordon & Rees LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

1           14. A CrossFit® Level 1 Trainer may open a CROSSFIT® gym—or, as CrossFit  
2 refers to them, a CROSSFIT® “box”—if the Level 1 Trainer enters into an annually renewable  
3 license agreement with CrossFit and becomes an authorized CROSSFIT® affiliate. Licensed  
4 CROSSFIT® affiliates are only authorized to use the CROSSFIT® brand name pursuant to the  
5 terms of the license agreement; in the absence of a license agreement with CrossFit, use of the  
6 CROSSFIT® trademarks is prohibited. Importantly, no gym may advertise that it has  
7 CROSSFIT® trainers or offers CROSSFIT® training unless it is an licensed affiliate, and no  
8 CROSSFIT® trainer may authorize a non-affiliated gym to advertise the trainer as affiliated with  
9 CrossFit. Currently, there are over 6,500 CROSSFIT® affiliates in the United States (over  
10 10,000 worldwide) and over 65,000 CROSSFIT® trainers in the United States (over 90,000  
11 worldwide).

12           15. Other than licensing its CROSSFIT® trademarks to trainers and gyms, CrossFit  
13 has also licensed its trademarks on an extremely limited basis to leaders in the field of athletic  
14 gear and equipment, including, for example, Reebok in association with apparel and shoes, and  
15 Rogue Fitness in association with exercise equipment. Attached as Exhibit F is a true and  
16 correct copy of a screenshot of Rogue Fitness’s webpage, [www.roguefitness.com/crossfit-](http://www.roguefitness.com/crossfit-equipment)  
17 [equipment](http://www.roguefitness.com/crossfit-equipment).

18           16. The American National Standards Institute (“ANSI”) accredits standards across  
19 industries, ensuring that the characteristics and performance of products or services are  
20 consistent, that people use the same definitions and terms, and that products/services are tested  
21 the same way. ANSI has accredited CrossFit to accredit others for CROSSFIT® fitness training.  
22 Attached as Exhibit G is a true and correct copy of CrossFit’s ANSI certification.

23           17. CrossFit tours the country every week, using CROSSFIT® affiliate facilities to  
24 hold training, certificate, and informational courses. During such visits, CrossFit ensures that the  
25 hosting affiliates continue to provide training consistent with the CROSSFIT®-brand principles.  
26 CrossFit also monitors any complaints it may receive and deals with those complaints  
27 accordingly.  
28

Gordon & Rees LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

1           18. Just as the CROSSFIT® brand of workouts has grown exponentially in  
2 popularity, the number of infringers have likewise increased, hoping to appropriate the goodwill  
3 CrossFit has amassed for their own benefit. The CROSSFIT® brand is extremely important to  
4 CrossFit, and CrossFit devotes a lot of time, energy, and money to defend its intellectual  
5 property rights.

6           19. CrossFit regularly reminds the readership of The CrossFit Journal of the  
7 importance of policing the CROSSFIT® trademarks and encourages everyone inside and outside  
8 the CrossFit community to report suspected infringement at <http://iptheft.crossfit.com>.  
9 CrossFit's staff investigates each instance of alleged infringement. For cases deemed to be  
10 infringement, the CrossFit staff will attempt to resolve the issues amicably. CrossFit retains  
11 outside counsel to handle cases that require additional attention.

12           20. CrossFit did not become aware of Defendants' infringement until around  
13 September 2012.

14           21. Attached as Exhibit H is a true and correct copy of the cease-and-desist  
15 communication that CrossFit sent Defendants on September 17, 2012.

16           22. Attached as Exhibit I is a true and correct copy of the cease-and-desist  
17 communication that CrossFit sent Defendants on October 1, 2012.

18           23. On or around December 13, 2012, after numerous communications with  
19 Defendants through CrossFit's outside counsel, Defendants finally removed all references to the  
20 CROSSFIT® trademarks on their site. CrossFit had considered the matter closed.

21           24. However, on or around February 2014, CrossFit discovered that Defendants had  
22 begun to use the CROSSFIT® trademarks yet again. This time, instead of using the  
23 CROSSFIT® trademarks on Defendants' main website as part of searchable text, Defendants  
24 used the CROSSFIT® trademarks in non-searchable images, advertising the sales of various  
25 "CrossFit Training Packages." Attached as Exhibit J are true and correct screenshots of  
26 Defendants' webpages from that time.

27 ///

28 ///

1 I declare under penalty of perjury under the laws of the United States of America that the  
2 foregoing is true and correct and that this declaration was executed on July 25, 2014 in San  
3 Diego, California.

4  
5   
6

7 Marshall Brenner  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

Gordon & Rees LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101